

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**CIVIL APPLICATION NO. 139 OF 2020**

**MODESTUS DAUDI KANGALawe (Administrator of the  
estate of the late Daudi Temaungi Kangalawe) ..... APPLICANT**

**AND**

**DOMINICUS UTENGA ..... RESPONDENT**

**(Application for extension of time to file notice of appeal and to apply for  
leave to appeal to the Court of Appeal against the whole judgment and  
decree of High Court of Tanzania at Iringa)**

**(SAMEJI, J)**

**dated the 30<sup>th</sup> day of September, 2016**

**In**

**Land Appeal No. 15 of 2016**

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**RULING**

29<sup>th</sup> September, & 1<sup>st</sup> October, 2021

**MWAMPASHI, J.A.:**

By way of notice of motion made under Rule 10 and 45A (1) (a) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant, Modestus Daudi Kangalawe prays for extension of time within which to lodge a notice of appeal and to apply for leave to appeal against the decision of the High Court (Sameji, J.) dated 30<sup>th</sup> September, 2016 in Land Appeal No.

15 of 2016. The applicant's previous application for the same orders before the High Court in Misc. Application No. 10 of 2019 (Matogolo, J) was refused on 07<sup>th</sup> February, 2020 hence this application as a second bite. The notice of motion is supported by an affidavit deposed by Modestus Daudi Kangalawe, the applicant. In opposition, there is an affidavit in reply deposed by the respondent, Dominicus Utenga.

At the outset, it is necessary to state the essential facts of the matter as gleaned from the affidavits.

The subject matter of the dispute between the parties is a land measuring about twenty acres. The applicant sued the respondent in the District Land and House Tribunal for Iringa at Iringa (the DLHT) in Land Application No. 86 of 2015, over the said land but he lost the case. Aggrieved he appealed to the High Court (Sameji, J.) in Land Appeal No. 15 of 2016 but he again lost the appeal. Still aggrieved and desiring to appeal against the High Court decision to this Court, he wanted to appeal but he was out of time. He therefore, applied for extension of time to file application for leave before the High Court (Feleshi, J.) in Miscellaneous Application No. 61 of 2016. The application was granted on 30<sup>th</sup> April, 2018. Within the given fifteen days he applied for leave before the High Court (Banzi, J), vide

Miscellaneous Application No. 17 of 2018, which was granted on 31<sup>st</sup> August, 2018.

According to paragraph 9 of the supporting affidavit, upon being granted leave and while waiting for certified copies of proceeding, judgment and decree for appeal purpose, he discovered that he had not filed a notice of appeal. Henceforth, he had to apply not only for extension of time to file notice of appeal but also for extension of time to apply for leave to appeal. He did so vide Miscellaneous Land Application No. 10 of 2019 (Matogolo, J.) which was however, dismissed on 07<sup>th</sup> February, 2020 hence this instant application by way of a second bite.

At the hearing of this application, while the applicant was represented by Mr. Marco Kisakali, learned advocate, the respondent appeared in person, unrepresented.

The applicant who had on 09.03.2020, filed a notice of preliminary objection challenging the competence of the supporting affidavit, sought to withdraw it, the reason being to pave way for the determination of the application on merit. Mr. Kisakali had no objection and the objection was accordingly marked withdrawn.

In his submission, Mr. Marco Kisakali started by adopting the notice of motion, the supporting affidavit as well as his written submission. Further, he argued that the application is premised on three grounds, **first**, that the applicant fell sick immediately after the decision of the High Court, **second**, that there was a technical delay and **third** that both the proceedings of both the trial tribunal and the High Court is tainted by irregularities and illegalities.

Submitting on the first ground, Mr. Kisakali referred the Court to paragraph 4 of the applicant's affidavit and to annexure MDK 2 to the said affidavit. He argued that immediately after the impugned decision of the High Court, he fell sick and was hospitalized at Ifunda Parish Health Centre until 10<sup>th</sup> November, 2016. After his recovery he made an application for extension of time to file application for leave which was granted followed by an application for leave to appeal, which was also granted. Thereafter, while waiting for certified copies of necessary documents for appeal purposes, he discovered that he had not lodged notice of appeal within 30 days of the impugned decision as required by the law. Mr. Kisakali further argued that the discovery prompted the applicant to file Miscellaneous Application No. 10 of 2019 for extension of time to file notice of appeal and also for leave to appeal. He pointed that the previous granted leave had been granted in

violation of Rule 46(1) of the Rules, hence ineffectual. He therefore insisted that, the above, explains the delay.

On the second ground, it was submitted by Mr. Kisakali that the applicant as a layman was confused and did not know what was supposed to be filed first between the notice of appeal and leave to appeal. On this he referred the Court to paragraphs 2 to 11 of the supporting affidavit insisting that the applicant did not know the procedure governing appeals from High Court to this Court. It was further argued that the applicant spent all that time in court corridors fighting for his rights. He also contended that the applicant has accounted for all days of delay from 30<sup>th</sup> September, 2016 to 07<sup>th</sup> February, 2020. He reinforced his arguments, by citing the decision of the Court in **Fortunatus Masha v. William Shija and Another** [1997] TLR 154.

Regarding the last ground, Mr. Kisakali argued that, the DLHT committed a number of irregularities during the trial. He pointed out that the assessors were changed within the trial and that they were allowed to cross examine witnesses. On the basis of the foregoing Mr. Kisakali prayed for the application to be granted. As to costs, he prayed the same to abide the outcome of the intended appeal.

The respondent, understandably, for being a lay person and unrepresented, had nothing much to argue. He only contested the claim that the applicant was sick. He argued that the applicant never fell sick otherwise he as a neighbour, would have known. He therefore, prayed for the application to be dismissed.

In his brief rejoinder, Mr. Kisakali insisted that the applicant was sick and that the same was proved by the medical chits tendered.

Having heard the submissions and arguments from both parties, the issue before me, is whether the applicant has managed to show good cause upon which extension of time as sought by him can be granted. Rule 10 of the Rules which is relevant here provides thus:

*"The Court may, **upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal**, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."*

[Emphasis added].

At this stage, it should first be restated that the power of the Court to extend time under rule 10 of the Rules, is both broad and discretionary. The discretion is judicial and it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrary. See- **Lyamuya Construction v. Board of Young Women Christians Association**, Civil Application No. 2 of 2010 (unreported).

The Court can only exercise its power given by rule 10 of the Rules, if good cause is shown. Whereas there is no invariable universal definition of what constitutes good cause, in exercising its discretion under the said provision, the Court is bound to consider the prevailing circumstances of the particular case and should also be guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. This position of law has been restated by the Court in a number of cases including; **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R 387, **Lyamuya Construction Company Limited** (supra), **Dar es Salaam City Council v. Jayantilal P. Rajan**,

Civil Application No. 27 of 1987, **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 and **Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) v. Mohamed Mshindo**, Civil Application No. 28 of 2017 (all unreported), to mention but a few.

On the basis of the above position of the law, it is my considered view that from the submissions made for the application and also from the supporting affidavit, the applicant's attempt to justify the delay, can be gleaned from paragraphs 9 to 11 of the supporting affidavit wherein it is deposed as follows:

9. *That, upon being granted the leave on 31<sup>st</sup> day of August, 2018 the applicant while waiting for letter from Honourable Deputy Registrar informing the applicant on the certified copies for purpose of preparing record of appeal instantly started to find some money and for further legal consultations, I discovered that I have no notice of appeal which was filed.*

10. *That, upon discovery and before issuance a letter from Deputy Registrar became aware that even time to file a notice of appeal was lapsed hence promptly filed Miscellaneous Land*



*Application No. 10 of 2019 before the High Court of Tanzania at Iringa.*

*11. That, I also discovered that since the decision intended to appeal against needed leave to appeal but was granted prematurely by Honourable I.K Banzi, J. as it was to be applied after the notice of appeal being filed then the Miscellaneous Land Application No. 10 of 2019 before the High Court of Tanzania at Iringa for extension of time to lodge notice of appeal and leave to appeal to the Court of Appeal out of time was filed.*

From the above reproduced part of the supporting affidavit, what is clear, is that after the delivery of the impugned decision, the applicant did not lodge the required notice of appeal which is imperative. Without first having lodged the notice of appeal the applicant's efforts in procuring leave to appeal were useless. It's the requirement of the law that the notice of appeal should be lodged first before the application for leave. This is provided by **Rule 46 (1)** of the Rules that:

*"Where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged."*

On the basis of the above position of the law, it is therefore clear that the time spent by the applicant pursuing applications for leave whilst no notice of appeal had been filed cannot amount to technical delay as claimed by the applicants. The distinction between a technical delay and a real or actual delay, was well articulated by the Court in the case of **Fortunatus Masha v. William Shija and Another** (supra) thus:

*"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved **technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted.** In the present case the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted."*

[Emphasis added].

In the instant case the delay was not technical because during the whole period of delay the notice of appeal of which extension of time is being sought in the instant application, had not been lodged. As it is deposed by the applicant in paragraphs 9, 10 and 11 of the supporting affidavit, the

delay was due to the applicant's negligence and ignorance of the law. It is settled that ignorance of law has never been accepted as a sufficient or good cause for extension of time See- **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No.10 of 2015 (Unreported). Likewise, negligence never constitutes a good cause.

Since it is obvious that the applicant's delay to lodge a notice of appeal was due to his ignorance of law and negligence the ground and argument that the delay was caused by sickness cannot be accepted. As it has been amply demonstrated above, the impugned decision was delivered on 30<sup>th</sup> September, 2016. According to the applicant he got sick soon thereafter up to 10<sup>th</sup> November, 2016 when he recovered. After recovering, from 10<sup>th</sup> November, 2016 up to 2019 he took no effort in regard to the notice of appeal, rather he wasted time seeking leave to appeal which, as I have alluded to, could not be pursued before the notice of appeal had been lodged.

The ground or illegality should not detain me. One of the requirements for illegality to constitute good cause is that it must be apparent on the face of the record. In the case of **Lyamuya Construction Company Limited** (supra) the Court elaborated that:

*"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA'S case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that 'of sufficient importance' and, I would add that **it must be apparent on the face of the record**, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."*

[Emphasis added]


In the instance case, the applicant is complaining that the proceedings of the DLHT is tainted by illegalities as the assessors, among other things, were allowed to cross-examine witnesses. However, the proceedings in question have not been included in the record. There is therefore no way the Court can tell that really there is an illegality apparent on the face of the record. For the omission to include the relevant record the ground on illegality fails.

On the basis of the foregoing findings, I find that the applicant has failed to show good cause to justify extension of time as sought. Consequently, the application is dismissed with costs.

**DATED** at **IRINGA** this 1<sup>st</sup> day of October, 2021.

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Ruling delivered this 1<sup>st</sup> day of October, 2021 in the presence of Mr. Marco Kisakali, counsel for the Applicant and in the absence of the Respondent dully notified, is hereby certified as a true copy of the original.

  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**